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No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

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ARGUMENT IN RESPONSE TO BRIEF OF RESPONDENT

ARGUMENT

I. The United States Supreme Court Looks to the Opinion of the State Court Decision in a "Syllabi" State in Order to Resolve Whether a Substantial Federal Question Had Been Passed Upon in the State Court, and the State Court Judgment Will Be Reviewed by This Court Where the Adequacy and Independence of Any Possible State Law Ground Is Not Clear From the Face of the Opinion.

This Court recognizes that although the syllabus constitutes the official opinion of the Supreme Court of Ohio, the syllabus must be read in light of the facts and issues of the case especially where the author of the opinion

erroneously rests his decision on compulsion by federal law.

Where the syllabus of the Ohio Supreme Court standing alone might have meant that the decision rested solely upon state law, and where the syllabus was accompanied by an opinion which erroneously placed the concurrence of its author upon compulsion by federal law, and where the report of the case did not disclose to what extent, if any, the other members of the Court may have shared the view expressed in the opinion, this Court held: First, that the opinion was an official part of the report of the case; Second, although the Ohio law recognized that the syllabus constituted the official opinion of the Court the law still required that the syllabus be read in the light of the facts and issues of the case; and Third, that the judgment would not be allowed to stand where the opinion accompanying the syllabus erroneously placed the concurrence of its author upon compulsion by Federal Law. *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952).

The Ohio Supreme Court opinion relies on a misapplication of the Double Jeopardy Clause and federal precedents interpreting its application. As in *Perkins*, at 443, "[T]o allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the Court below had felt free, under our decisions, to do so."

The first syllabus applies Ohio Revised Code Section 2941.25(A) to the aggravated robbery and theft offenses. The court interprets the Double Jeopardy Clause and the applicable federal precedent in its determination of the two aforementioned offenses as offenses of similar import. It is expressly stated by the court that the multiple count

statute, Ohio Revised Code Section 2941.25, is no more than an attempt to "effectuate" the principles contained in the Double Jeopardy Clause, *State v. Johnson*, 6 Ohio St. 3d 420, at 422 (1983); citing, *State v. Thomas*, 61 Ohio St. 2d 254, at 259, 260 (1980). Nowhere does the court determine that the legislature has opted for a more restrictive approach to the issue of multiple crimes, as Respondent asserts at page 8 of his brief. The Court, in effect, applied the Double Jeopardy Clause and its interpretative federal precedents because Ohio Revised Code Section 2941.25 is the statutory embodiment of the federal law.

Respondent has attempted to create a distinction between the multiple count statute and the Double Jeopardy Clause as interpreted by federal law. The notion that Ohio has opted for a more restrictive approach to the issue of multiple crimes in no way reflects the decisions of the Supreme Court of Ohio.

Ohio Courts have expressly recognized the allied offense statute as a "sentencing vehicle". *State v. Kent*, 68 Ohio App. 2d 151, at 154 (1980). Where a defendant pled guilty to Rape and to Kidnapping and the Court accepted the guilty pleas to both counts, the defendant argued that the trial court erred in entering conviction and judgment for both Rape and Kidnapping because Rape and Kidnapping were offenses of similar import subject to the limitations of Ohio Revised Code Section 2941.25(A). *State v. Kent*.

Citing *State v. Osborne*, 49 Ohio St. 2d 135, 144 (1976), vacated on other grounds 438 U.S. 911 (1978), the *Kent* Court held:

> "[t]he allied offense statute does not mean that persons cannot be either indicted, tried, or found guilty of

multiple offenses, even where they were classified as allied offenses.

The allied offense statute merely provides that where allied offenses are present, the person can only be convicted of one of the offenses. *Conviction in this contest means a judgment of conviction.*

A judgment of conviction has been defined as a plea or verdict of guilty and the sentence imposed. Ohio Rule of Criminal Procedure 32(B); *State v. Henderson* 58 Ohio St. 2d 171 (1979). Thus, the sentence imposed completes the judgment of conviction. When we speak of the allied offense doctrine, we are speaking of offenses for which an individual may be sentenced. *In reality, the allied offense statute is a sentencing vehicle." State v. Kent,* 68 Ohio App. 2d 151 at 154 (1980). (Emphasis added.)

Respondent would have this Court believe that the allied offense statute in Ohio prohibits convictions on allied offenses unlike the Double Jeopardy Clause which does not prohibit multiple convictions but goes only to sentencing. Clearly, Ohio Courts have determined that the allied offense statute is a sentencing vehicle, a view which is consistent with the Double Jeopardy Clause and its interpretative federal case law.

The Supreme Court of Ohio not only recognizes the allied offense statute as the statutory embodiment of the Double Jeopardy Clause, it has expressly stated that Ohio Revised Code Section 2941.25 does not prevent a defendant from being convicted on all counts of a multiple count indictment. *State v. Osborne,* 49 Ohio St. 2d at 144.

In *Osborne,* the prosecution was justified in submitting both premeditated murder and felony murder counts to the jury. The only prohibition imposed by the

allied offense statute was against sentencing on both counts if they were found by the court to be allied offenses.

In the present case, even if there are allied offenses involved, there is no prohibition imposed by either the Double Jeopardy Clause or its statutory embodiment, Ohio Revised Code Section 2941.25, against submission to the jury of all counts of a multiple-count indictment. The determination of whether allied offenses are involved is a legal determination based on the evidence. If guilt is found, then the Double Jeopardy protections, embodied in the allied offense statute, prevent multiple sentencing. Emphatically, the law in Ohio does not prohibit the prosecution from submitting multiple count indictment to a trier of fact. The allied offense statute comes into play only as a legal issue for the court to determine. Respondent is alone in his interpretation of the allied offense statute, for the Ohio courts have never held that the statute is anything more than a sentencing vehicle. The constitutional and common law foundations of the Double Jeopardy Clause provide the basis for the multiple-counts statute.

The respondent further contends that "regardless of this Court's decision on federal laws, the Ohio Court on remand would be free to adhere to its former judgment based on Ohio Revised Code Section 2941.25." Brief of Respondent, page 15.

Nothing could be further from the truth. If this case is remanded the people of Ohio must be entitled to at least one full and complete opportunity to try the Respondent. In the event of convictions of Murder and Aggravated Robbery, the Respondent's Double Jeopardy protection pursuant to Ohio Revised Code Section 2941.25 can be guaranteed by his exercise of the right afforded to him by Ohio Revised Code 2953.21 (Petition for Writ

of Certiorari, Appendix A-28), which allows an accused the right to petition the trial court to vacate or set aside a sentence.

If the Respondent voluntarily fails to avail himself of that right, he has waived his rights pursuant to the Double Jeopardy provisions and cannot complain of a constitutional violation.

Respondent cites *State v. Logan*, 60 Ohio St. 2d 126 (1979), for the proposition that the test of allied offenses of similar import is much broader and more inclusive than any test for the "same offense" with regard to the Double Jeopardy Clause. In actuality, the test used in *Logan* was nothing more than the *Blockburger* test. The words of the court make this abundantly clear:

> "We believe that prolonged restraint with asportation may be as penologically significant as substantial asportation and, under certain circumstances, will support a conviction for kidnapping as a separate act or animus from that of rape.
>
> Secret confinement, such as in an abandoned building or nontrafficked area, without the showing of any substantial asportation, may, in a given instance, also signify a separate animus and support a conviction for kidnapping apart from the commission of an underlying offense.
>
> *The primary issue, however, is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.* In the instant case, the restraint and movement of the victim had no significance apart from facilitating the rape. The detention was brief, the movement was slight, and the victim was released

> immediately following the commission of the rape. In such circumstances, we cannot say that appellant had a separate animus to commit kidnapping." *State v. Logan*, at 135. (Emphasis added.)

Effectively the court is saying that Kidnapping and Rape are not allied offenses in some cases, but they are in this particular case because in proving the Rape count the State must, a priori, prove the Kidnapping count. The Kidnapping count in *Logan* did not require proof of any additional element which the Rape count did not include. Since the Kidnapping does not require proof of any additional facts which the Rape requires, the counts are allied offenses. Rather than broadening the Double Jeopardy Clause, the court is regarding the allied offenses statute as an embodiment of the Double Jeopardy Clause and doing nothing more than applying the *Blockburger* test.

In *Michigan v. Long*, 77 L. Ed. 2d 1201 (1983), this Court encountered an argument similar to Respondent's Argument. Long argued that Michigan courts had provided greater protection from searches and seizures under the state constitution than were afforded under the Fourteenth Amendment, and that therefore, there was an adequate and independent ground for the decision below. Respondent argues that because the allied offense statute broadens Double Jeopardy protections, there is an adequate and independent state ground for the decision. The argument fails in the present case for the following reasons.

The opinion of the Ohio Supreme Court is laden with references to the Double Jeopardy Clause and federal case law. As previously argued, the allied offense statute is referred to by the Court as "further effectuating the principles contained in the Double Jeopardy Clause." *State v. Johnson*, 6 Ohio St. 3d at 422. The second syllabus

expressly mentions the Double Jeopardy Clause which is, in fact, the cornerstone of the second syllabus.

Respondent's attempt to broaden the coverage of the Double Jeopardy Clause springs from an unsupported, unique approach to the law of Ohio. Coincidentally, the same approach failed in *Long*, as it should here. In *Long*, not a single state case was cited to support the State Court's holding that the search of a vehicle's passenger compartment was unconstitutional. The opinion of the Supreme Court of Ohio relies upon seven federal cases and the Double Jeopardy Clause. Only three state cases and statutes are cited. The three cases are: *State v. Thomas*, 61 Ohio St. 2d 254 which holds that the allied offense statute is the statutory embodiment of the Double Jeopardy Clause, *State v. Harris*, 58 Ohio St. 2d 257 and *State v. Logan*, 60 Ohio St. 2d 126, are also cited, but are nothing more than restatements of the *Blockburger* test. Because the state case law cited merely restates the Federal law, and because the state case law is utilized to interpret the allied offense statute, the conclusion is inescapable that the allied offense statute was read by the Ohio Supreme Court in light of federal law and there is no adequate independent state ground upon which the decision rests.

There being no adequate independent state ground for the decision below, dismissal of this case will not aid in the important task this Court faces in developing uniformity in federal law.

> "[O]utright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in Federal law, and this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the

> *independence* of an alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate where there is strong indication . . . the federal constitution as judicially construed controlled the decision below." *Minnesota v. National Tea Co.*, 309 U.S. 551, at 556; *Michigan v. Long*, 77 L. Ed. 2d 1201, at 1214.

In determining whether the Court has jurisdiction to review a case that allegedly rests on adequate state grounds, the Court will "assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the State court rested its decision primarily on Federal law." *Long*, 77 L. Ed. 2d, at 1215. The opinion of the Ohio Supreme Court rests on the Double Jeopardy Clause and federal common law. The only Ohio cases utilized are mere explications of federal law. The opinion itself provides that the allied offense statute further effectuated the Double Jeopardy Clause. Because the decision rests primarily on federal law and it is certainly unclear that the decision rests on adequate state grounds, consistent with *Long*, the Court should assume that there are no adequate state grounds and should review the case.

Finally, the Court in *Long* attempted to clarify the issue of jurisdiction to review state court opinions by requiring a plain statement that the decision below rested on an adequate and independent state ground. *Long*, at 1216. Otherwise,

> "when . . . a State court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reason-

able explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Long*, at 1214.

There is no plain statement that the decision below rested on an adequate and independent state ground, nor is there any plain statement in the decision that the federal cases were used only for the purpose of guidance and did not themselves compel the result that the Court reached. It is incumbent upon this Court to review the opinion of the Ohio Supreme Court which rests primarily on Federal grounds with no adequate independent state ground apparent from the four corners of the opinion.

II. The Double Jeopardy Clause of the United States Constitution Does Not Prohibit Trial of the Respondent on the Charges of Murder and Aggravated Robbery.

The Respondent in Section II of his brief argues that the Double Jeopardy Clause of the United States Constitution prohibits trial of the Respondent on the charges of Murder and Aggravated Robbery. The Respondent breaks this argument down into three sections titled A, B, and C.

The Respondent in Section A of his brief argues that Involuntary Manslaughter is a lesser included offense of Murder and he cites *State v. Wilkins*, 64 Ohio St. 2d 382 (1980), as authority for that argument. On page 19 of the Respondent's brief, he writes the following:

> . . . The Ohio Supreme Court held that one offense is, a lesser included of another if all three of the following tests were met:
>
> 1. One offense must be lesser in degree than the other,
> 2. The offense of the greater degree cannot be committed without the lesser offense also being committed, and
> 3. Some element of the greater is not required to prove the commission of the lesser.

Using these criteria, it is obvious that Involuntary Manslaughter is not necessarily a lesser included offense of Murder and that the Ohio Supreme Court erred in ruling that it is. In applying the criteria established by the Ohio Supreme Court in *Wilkins* to the case at bar, only one of the three requisites is met. The first criteria is that one offense must be lesser in degree than the other and, in fact, Involuntary Manslaughter is a lesser degree crime than Murder. But it is certainly unclear as to whether or not the other two requisites are met. The second criteria established in *Wilkins* is that the offense of the greater degree cannot be committed without the lesser offense also being committed. In this particular case it is not certain that during the perpetration of a Murder that the perpetrator must, in fact, commit a misdemeanor.

The Respondent criticizes the State of Ohio for not citing the specific misdemeanor upon which hinges the

charge of Involuntary Manslaughter. But, truly, the Respondent cannot criticize the State of Ohio since he could have determined the identity of the misdemeanor through normal discovery procedures. The Respondent could have asked for a Bill of Particulars or he could have asked for Discovery and, thereby demanded that the State of Ohio name the underlying misdemeanor. The Respondent chose not to do any of these. Instead the Respondent, lemming-like, rushed to plead "Guilty" to the crimes of his choice in a blatant attempt to avoid prosecution on the greater charges. He now asks this Court to agree with him that the commission of a Murder would unavoidably result in also committing the crimes of Felonious Assault, Assault, Menacing, or Discharging a Firearm within the city. This is nonsense, a Murder can be committed without, a priori, committing menacing or discharging a firearm in the City limits or various other misdemeanors.

The Respondent also fails to meet the criteria of Subparagraph 3 of *Wilkins*, which requires that some element of the greater offense is not required to prove the commission of the lesser. There is an element of Murder, namely a purposeful mental intent, which is not required to prove the Involuntary Manslaughter. But Involuntary Manslaughter also requires proof of the commission of a misdemeanor which Murder does not. Once again the Respondent is asking the Court to assume that there is a mental intent involved in the misdemeanor. This might have been a valid argument had the defendant taken the time to determine what misdemeanor was the basis of the Involuntary Manslaughter. But since he failed to do that, he cannot now claim that whatever misdemeanor was the basis of the manslaughter, certainly it must have had a mental intent requirement. The fact of the matter is that

Murder has a mental intent of "purposely". The mental intent of the Involuntary Manslaughter will rest upon the mental intent of the misdemeanor involved in Involuntary Manslaughter. And as the Petitioner has argued in his brief, there are misdemeanors in the State of Ohio that require no mental intent. The two offenses, therefore, have separate and independent elements, and Double Jeopardy does not bar their separate prosecutions.

For this reason, the present case is highly analogous to *Illinois v. Vitale*, 447 U.S. 410 (1980). Pursuant to *Vitale*, the "mere possibility that the State will seek to rely" on all the ingredients necessary to prove the Involuntary Manslaughter to establish an element of its Murder charge would not be sufficient to bar the prosecution on the charge of Murder. *Vitale*, 447 U.S. at 419.

The Respondent next argues in Section B of his second argument that "the collateral estoppel ingredient of the Double Jeopardy Clause prohibits further prosecution of the Respondent," Brief of Respondent, page 23. Respondent bases his argument principally upon *Ashe v. Swenson*, 397 U.S. 436 (1970). *Ashe*, is so factually distinguishable from the case at bar, that it is really inapplicable. This is not a question of collateral estoppel pursuant to *Ashe*. In *Ashe*, the defendant was indicted for several counts of robbery involving the robbery of several members of a card game. The State in that particular case chose to try the defendant one victim at a time. Unfortunately for the State in that case, the jury found the defendant "Not Guilty" on the first trial. This court ruled that since the ultimate fact of whether or not the defendant had perpetrated the robbery had been decided by a jury, then any further prosecution of the defendant concerning the other victims was prohibited by collateral estoppel.

Is it Respondent's contention that if the accused in *Ashe* had been convicted at the first trial that the State would have been precluded from trying him for the other victims? This seems a bizarre interpretation of *Ashe*. Although the Respondent argues . . . "there is nothing at all in the history of collateral estoppel to suggest that it only applies to acquittals," Brief of Respondent, page 25, certainly there is nothing in the history of collateral estoppel, at least nothing cited by the Respondent, that indicates that the issue of collateral estoppel would be applicable to the case at bar. There has been no litigation of any ultimate fact in this particular case.

The word "Litigate", as defined by BLACK'S LAW DICTIONARY (5th ed. 1979), page 841, means "to make the subject of a law suit; to contest in law; to prosecute or defend by pleadings, evidence, and debate in a court." There has been no debate or presentation of any evidence concerning any ultimate issues in this particular case. The defendant has voluntarily chosen to plead "Guilty" to the lesser crimes. He has done this in an obvious attempt to thwart justice and prevent the People from fully prosecuting him for the heinous and despicable acts that he has perpetrated upon Thomas Hill, and he now seeks to distort and pervert the principles of collateral estoppel and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution to suit his needs. Unfortunately for Respondent, he has not been able to cite any case which is specifically on point and which supports his argument that collateral estoppel prohibits further prosecution in this particular fact situation. Instead the Respondent wishes this Court to accept his own theory of what the law should be as being what the law is.

Surely collateral estoppel and the principles of Double Jeopardy were not intended to protect an accused in these

circumstances, a situation of his own creation, a situation in which the State of Ohio has not been accused of acting improperly, and in fact has not done so.

Respondent finally argues in section C of his second argument that "a trial now on Murder and Aggravated Robbery would put the Respondent 'twice' in jeopardy." Brief of Respondent, page 27. The Respondent in Argument C, argues as if being "twice" in jeopardy was an absolute bar to a continued prosecution. This is, in fact, not an accurate proposition. There are a number of situations in which continued prosecution is constitutionally permissible. A new trial is permitted following the defendant's successful appeal of his conviction, *United States v. Ball*, 163 U.S. at 672 (1896); where a mistrial has been declared from the manifest necessity caused by a military advance, *Wade v. Hunter*, 336 U.S. at 688 (1949); where the defendant has requested a mistrial in the absence of judicial or prosecutorial overreaching, *United States v. Dinitz*, 424 U.S. 600 (1976); or where an indictment is dismissed at the request of the defendant and in a situation functionally equivalent to a mistrial, *Lee v. United States*, 432 U.S. 23 (1977). Certainly continued prosecutions were proper in *United States v. Scott*, 437 U.S. 82 (1978) and *Jeffers v. United States*, 432 U.S. 137 (1977).

In the exceptions which allow continued, or second, prosecutions, the exceptions are based upon a common sense application of the intended protections of the Double Jeopardy provision in relation to the rights and interests of the people. Whether or not the Double Jeopardy provision prohibits a continued or second prosecution must be determined by that weighing and balancing test. In this particular case, the rights and interests of the Respondent must fail in relation to the rights and interests of the People in having one full and complete proceeding.

Respondent cites *United States v. Scott*, and argues that *Scott* is distinguishable from the case at bar because the two indictments dismissed in *Scott* were dismissed prior to an adjudication of guilt or innocence for those offenses. This is a difference without distinction. Scott was originally indicted on a three count narcotics indictment, and it was his voluntary acts in bifurcating the proceedings that permitted his second prosecution. Scott had moved both before and during the trial to dismiss two counts. He finally persuaded the court to do so at the close of the presentation of evidence. Two of the counts were dismissed and the defendant was found "Not Guilty" on the remaining count. Now the Respondent argues that *Scott* is distinguishable from the case at bar, and of course, factually, there are distinguishing features. But it was the defendant's conduct in *Scott* which is distinguishable, not the absence of a factual determination which permitted a continued prosecution or a second prosecution of Scott when a jury had found him "Not Guilty" of the first count.

The Respondent further argues that "Johnson, unlike Scott, sought termination because of, and after, a determination of his guilt." Brief of Respondent, page 28. This is a strained distinction. Scott, like Johnson, was doing his utmost to avoid being fully penalized for the crimes for which he had been accused. Scott sought to terminate the two counts of the indictment at every opportunity, before, during, and after the presentation of the evidence. Johnson, just like Scott, is attempting to avoid the determination of his guilt on two counts of an indictment and the fact that Johnson has chosen to approach the problem in a little different manner than Scott surely does not invalidate the principles established by this court in *Scott*.

The Defendant-Respondent's interpretation of *Jeffers v. United States,* is even more bizarre. He writes that "*Jeffers* is not controlling because it is a plurality opinion and the concurrence is based on solely different grounds that do not implicate the Fifth Amendment at all." Brief of Respondent, page 31 and 32.

It seems odd to argue that *Jeffers* does not implicate the Fifth Amendment, when, in fact, Jeffers, like Johnson, argued that the Double Jeopardy provision of the Fifth Amendment prohibited his continued prosecution. Four Supreme Court Justices ruled that the Double Jeopardy Clause did not prohibit further prosecution of Jeffers and they formed a majority because a fifth judge felt that *Ianelli v. United States,* 420 U.S. 458 (1973) was controlling, i.e. that even though the two charges may have been the same for Double Jeopardy purposes that Congress had indicated that cumulative sentences were in order. Certainly the four dissenting justices discussed the Double Jeopardy protections, and they felt that the Double Jeopardy provision protected Jeffers because they perceived that the government had acted improperly. It is redundant, but significant, to add that no one has accused Ohio of acting improperly in indicting Johnson in the manner in which it did.

Both *Scott* and *Jeffers* are highly analogous to the case at issue. They both involve defendants who were validly indicted and who sought to bifurcate and terminate portions of those valid indictments, and later claimed that Double Jeopardy protected them from the continued prosecution on those indictments. In both *Scott* and *Jeffers* it was the accused who voluntarily chose to bifurcate the proceedings. The Respondent argues that "*Johnson* pleaded 'Guilty' and never attempted to bifurcate two cases in which the issues were joined and trials pending." Brief

of Respondent, page 33. But this is, like most of his arguments, a strained contention. Certainly Johnson in this particular case pled "Guilty" with the intention of bifurcating this indictment. Johnson did not enter pleas of "Guilty" to Involuntary Manslaughter and Grand Theft because of feelings of remorse or concern about the murder of Thomas Hill. He pled "Guilty" to the crimes of his choice so that he could minimize the period of his incarceration. Everything, every act that Johnson has taken in these particular proceedings has screamed of bifurcation, of separating the counts of these indictments, one from the other, so that he could avoid the penalty of the greater offenses. It is this voluntary action on the part of the Defendant, coupled with a denial of the State of Ohio's right to one full and complete hearing that now relieves the Respondent of the protection of the Double Jeopardy Clause of the United States Constitution. The Respondent has in his brief, just as he has in his prior pleadings, sought to impose a hypertechnical and extremely rigid standard upon the courts of Ohio and now of the Federal Courts. Surely, the Double Jeopardy provision was not intended to protect an individual in this particular fact situation. It was not intended to emasculate the criminal prosecution of murderers and robbers.

CONCLUSION

For all the foregoing reasons the decision of the Ohio Supreme Court must be reversed and remanded so that the Respondent can be brought to trial and fully prosecuted for the acts he has committed.

Respectfully submitted,

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